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No. 04-81

In the Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

BASF's pending petition presents two important issues of federal law, the first involving preemption of state-law claims under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 *et seq.*, and the second involving the First Amendment. BASF submits this supplemental brief under Rule 15.8 to discuss the impact of the Court's ruling in *Bates* v. *Dow Agrosciences, LLC*, No. 03-388, on the first issue presented by the petition.

ARGUMENT

I. THE DECISION BELOW IS FLATLY INCONSISTENT WITH *BATES*

The *Bates* decision directly supports petitioners' argument in this case. The Court has stated that FIFRA "preempts any statutory or common-law rule that would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations." Slip. op. at 13-14; see also *id.* at 20 ("We emphasize that a state-law labeling requirement must in fact be equivalent to a requirement under FIFRA in order to survive preemption."). In this case, respondents' claims clearly do establish state-law standards for labeling that diverge from EPA's regulations.

Because the Minnesota Supreme Court did not follow the rule of preemption that the Court has announced, and because this case presents a perfect opportunity for the Court to explain the affirmative reach of FIFRA preemption in an important and recurring context, the petition for certiorari should be granted. At the very least, the Court should grant, vacate, and remand the case to the Minnesota Supreme Court so that it may reconsider its decision in light of the *Bates* opinion.

A. Because Respondents' Claims Impose State-Law Labeling Standards That Diverge From Specific EPA Regulations, *Bates* Establishes That They Are Preempted

Concurring in the *Bates* decision, Justice Breyer wrote separately "to stress the practical importance of the Court's statement that state-law requirements 'be measured against' relevant [EPA] regulations 'that give content'" to FIFRA. Slip. op. (Breyer, J., concurring), at 1. The multi-million dollar judgment below is premised on a direct attack on labeling practices that EPA either mandated or expressly approved in regulations adopted under FIFRA.[1] Because the decision below thus "alter[s] * * * the substantive rules governing liability for labeling" (*Bates*, slip. op. (Thomas, J., concurring in the judgment in part and dissenting in part), at 1), it conflicts with this Court's decision in *Bates* that such claims are preempted.

Although respondents now attempt to obscure their focus on BASF's labeling, they repeatedly acknowledged below that "fraudulent and deceptive labeling" is "the crux of this case." See Letter from plaintiff's counsel to Judge Kraker (Nov. 2, 1998), at 3 n.4; see also Pl. Supp. Ans. to Interrog. No. 7 (1/27/00) ("BASF knowingly concealed, suppressed, or omitted from the various labels that accompanied Poast Plus the fact that EPA registered Poast Plus for use on minor crops. This knowing concealment, suppression or omission of material facts forms the basis of this action."); Motion in

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[1] Unlike *Bates*, which was decided on an early summary judgment motion, judgment in this case was entered after an extended trial ending in a jury verdict. The full record that is available here proves beyond doubt that respondents' claims rested squarely on their contention that BASF's EPA-approved labeling practices were wrongful.

Limine Tr. at 150 (respondents' counsel states that BASF "could have moved all those crops over to the Poast Plus label, but they didn't. They designed this scheme and plan to improperly exploit minor crop farmers."). Respondents' fraud claim should not have been allowed to proceed, because the aspects of the labeling that they attacked were either required or expressly authorized by FIFRA.

First, respondents claimed that BASF committed consumer fraud by naming and registering Poast and Poast Plus as two different pesticides when, in *their* view, the two products were functionally identical. See, *e.g.*, Cmplt. ¶ 2 (alleging that BASF's deceptive acts include "advertis[ing] and market[ing] these equivalent formulations * * * as two separate products under two separate brand names and two separate prices"); Tr. 2529:1-2 (plaintiffs' counsel argues that "[t]he company marketed and sold one product as two different products to exploit a segment of the market"); Tr. 1170, 1187, 1204, 1225 (plaintiff repeatedly contends that Poast and Poast Plus were "identical product[s]" and admits that "if they actually were different," he "wouldn't" "have a complaint"); Tr. 1296 (plaintiff states that his complaint against BASF rests on "the fraud of selling one product as two"); Tr. 563, 583 (plaintiff states that Poast and Poast Plus are "the same" and "are identical products"); Tr. 2174 (plaintiff states that his "complaint to BASF is that they lied to us because Poast and Poast Plus is the same product"). See also Pet. 13; Reply Br. at 2.

Because the formulations of Poast and Poast Plus differ to the degree specified by federal regulations, however, those regulations *required* BASF to label the products with two different names and to register them as separate products. See Pet 3, 4. Thus, the state-law labeling standard that this judgment creates – *i.e.*, that pesticides having the same active ingredient should be labeled as the same product – plainly diverges from FIFRA's requirements.

Second, respondents contended that BASF's labels were deceptive and unconscionable because the labels did not indicate that Poast Plus was federally-registered for use on minor crops[2] and thus did not allow minor crop farmers lawfully to use the product. See, *e.g.*, Tr. 3768 (respondents' counsel states in closing argument that "the only problem was, the minor crop grower couldn't get access to [Poast Plus] because BASF denied them access to it"); see also Pet. 12-13; Reply Br. at 3.

As respondents have repeatedly conceded, however, an EPA regulation *specifically provided* that manufacturers were entitled to omit federally-registered uses from the labeling. 40 C.F.R. § 152.130(b); see also Pet. 3. Because no State had registered Poast Plus for minor crops, furthermore, it would have been illegal in *every* State for BASF to label or market Poast Plus for that purpose or for minor crop farmers to use Poast Plus. The state-law labeling standard imposed by this aspect of the case – *i.e.*, that pesticide labels may be considered deceptive and unconscionable if federally-registered uses are excluded from them – thus also flatly contradicts EPA's labeling standards.

As Justice Thomas stated in *Bates*, a consumer fraud claim "should be pre-empted insofar as it imposes liability for label content where FIFRA would not." Slip. op. (Thomas, J., concurring in the judgment in part and dissenting in part), at 2. Under the decision below, however, a plaintiff seeking to second-guess EPA's pesticide labeling rules could do so in virtually any case simply by invoking the moniker of

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[2] See, *e.g.*, Tr. 1397-1398 (labels were "deceptive" in stating "that Poast Plus could be used only on those four crops"); Tr. 590 (label misleadingly "says you can't use it [for minor crops], but in actuality the registration said it's okay"); Tr. 1448 ("I felt that we were being deceived * * * [because] the crops that were registered for Poast Plus and what was actually put on the label are two different things").

consumer fraud. Because the Minnesota Supreme Court's decision is irreconcilably in conflict with *Bates*, it should not be permitted to stand.

B. The Judgment Below Cannot Be Squared With *Bates* Because The Trial Court Refused To Instruct The Jury Regarding FIFRA's Pertinent Requirements

In *Bates*, this Court directed that, "[i]f a defendant so requests, a court should instruct the jury on the relevant FIFRA misbranding standards, as well as an regulations that add content to these standards." Slip. op. at 8. As the Court recognized, such instructions are necessary to guard against the possibility that a state-law judgment will impose requirements that are "in addition to or different from" federal law. *Id.* In this case, however, the trial court refused BASF's request for jury instructions explaining the FIFRA regulations applicable to its conduct. See Pet. 8.

As explained in more detail in BASF's petition and reply brief, BASF's labeling of Poast and Poast Plus – which respondents contended was deceptive and unconscionable – complied fully with EPA's regulations. The applicable regulations included the rules requiring separate registration of products having sufficiently different formulations, and the "subset labeling rule," which permits a manufacturer to label a pesticide for only a subset of its registered uses.

BASF asked the trial court to instruct the jury on FIFRA's pertinent requirements. See Defendant BASF's Supp. Proposed Jury Instr. Nos. 18-37. For example, BASF requested an instruction that "[t]he EPA's regulations prohibited BASF from using the exact same name for Poast and Poast Plus." BASF's Supp. Proposed Jury Instr. No. 29. BASF also requested an instruction that "EPA allows a company to label an herbicide for fewer crops than registered by the EPA." BASF's Supp. Proposed Jury Instr. No. 21. Acceding to respondents' objections, the trial court refused to

give these instructions, or any other instructions explaining FIFRA's requirements. Tr. 3831-3850.

Accordingly, the jury in this case was asked to evaluate BASF's conduct under *state* law without having any authoritative guidance regarding *federal* requirements. Without such guidance, there was no way for the jury to avoid imposing state-law labeling standards that were "in addition to or different from" FIFRA's standards. Because the decision below thus cannot be squared with this Court's directive in *Bates*, it should not be permitted to stand.

C. In Tension With *Bates*, The Decision Below Imposes A State-Law Duty To Market Federally-Registered Products That Overrides Manufacturers' Legitimate Safety Concerns

In deciding *Bates*, the Court recognized that EPA's registration of a pesticide does not necessarily reflect a judgment by the agency that the product is safe and efficacious for all of its approved purposes. Slip. op. at 7. Moreover, the Court suggested in *Bates* that a previously-approved label may be deemed "misbranded" under FIFRA based on later-developed information or testing. *Id.* at 14. Under the decision below, however, federal registration of a product creates a state-law duty to market the product for all registered uses. Because that pernicious rule will undermine FIFRA and cannot be squared with *Bates*, the decision below should not be permitted to stand.

The Minnesota Supreme Court noted that EPA registered Poast Plus for minor crops based on the same *residue* testing data that it used to approve Poast. Pet. App. 4a. Pursuant to the waiver of efficacy data review requirements that the Court considered in *Bates* (slip op. at 7), however, EPA did *not* review *crop-safety* testing data before it registered Poast Plus for use on minor crops. While BASF had conducted some testing of Poast Plus on minor crops prior to registration, its *internal* standards required it to conduct extensive

additional safety testing before it sold Poast Plus for minor crops. As the documents introduced at trial demonstrated, BASF's scientists never were satisfied that the product was sufficiently *proven safe* to be sold for minor crops: the full range of the requisite testing was never completed, and the limited testing that *was* done had raised red flags about the product's suitability for minor crops. Tr. 2923, 2946.

As discussed above, EPA's own rules sensibly permit a manufacturer *not* to include all registered uses on the labels. Under the decision below, however, a manufacturer cannot exclude registered uses from the labeling without risking liability under state-law consumer fraud statutes. To avoid the risk of such liability, a manufacturer must expose itself to potential liability for design defect or inadequate testing claims by marketing a product in spite of safety concerns. Because respondents' action thus imposes "state-law labeling requirements that are 'in addition to or different from' the labeling and packaging requirements under FIFRA" (*Bates*, slip op. at 14), and are completely at odds with sound public policy, the decision below should be reversed.

D. Respondents' Action Tramples Upon The States' Important Role In Pesticide Regulation, Which This Court Recognized In *Bates*

In *Bates*, the Court recognized that FIFRA expressly preserves an important role for the States in regulating pesticides. Slip. op. at 9. Indeed, every State exercises its prerogative under FIFRA to require separate state registration (approval) of pesticides before they may be sold within its borders. See Tr. 2661-2662. Here, it was undisputed that no State had registered Poast Plus for use on minor crops, and that BASF could not lawfully have labeled or marketed Poast Plus for minor crops in any State without first securing the appropriate state registration.

Nevertheless, the Minnesota Supreme Court found that BASF committed consumer fraud by failing to seek state reg-

istration for Poast Plus. See Pet. App. at 21a ("the 'problem' * * * was BASF's failure to seek state registration for Poast Plus on all the crops"). The court also simply *presumed* that the independent regulators in each of the 50 States would have approved the use of Poast Plus on minor crops in their States if BASF only had asked. See *id.* Yet any State (and all States) could have denied BASF permission to market Poast Plus on minor crops.[3] In treating state registration as a given, the Minnesota Supreme Court stripped away the autonomy of each State – carefully preserved by Congress in enacting FIFRA – to *independently* review, and approve or disapprove, the pesticides to be used in that State – rendering the States' role a nullity.

Because the Minnesota Supreme Court, in ruling *against* preemption, has overlooked the States' important role in regulating pesticides under FIFRA, its decision cannot be squared with *Bates* and should be further reviewed.

II. RESPONDENTS' CLAIMS UNDERMINE EPA'S AUTHORITY OVER PESTICIDE LABELING

In his concurring opinion in *Bates*, Justice Breyer opined that "EPA may prove better able than are courts to determine whether general state law tort liability rules * * * bring about a counterproductive 'crazy-quilt of anti-misbranding requirements'" that undermine FIFRA. Slip. op. (Breyer, J., concurring), at 1-2. Because the decision below imposes labeling rules that squarely conflict with existing EPA regulations and thus undermines EPA's authority over pesticide labeling, we have little doubt that EPA would determine that respondents' claims are preempted.

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[3] Indeed, California did not allow BASF to market Poast Plus for *any* crops, despite the fact that Poast Plus had a federal registration. Ignoring that fact, the court below ruled that California farmers nevertheless were entitled to damages under New Jersey law because BASF did not successfully register Poast Plus for *minor* crops in California.

In their most recent supplemental brief, however, respondents contend that the agency would oppose preemption in this case. As we have shown elsewhere (see Reply Br. at 4-5, 6-7) and discuss briefly here,[4] that assertion is wrong. Should the Court have any question that respondents' claims would interfere with EPA's ability to administer the federal pesticide labeling scheme, however, we respectfully suggest that the Court invite the Acting Solicitor General to submit a brief

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[4] For example, respondents rely on the statement by an EPA official that the omission of minor crops from the Poast Plus label was "a company marketing decision in which the EPA had no input." Resp. 2nd Supp. Br. at 3. As we have previously explained, however, the "company marketing decision" at issue was *BASF's decision to use subset labeling*, a practice that EPA regulations expressly authorize. Respondents also cite an EPA official's statement that this was "not a regulatory matter." *Id.* But that statement, which came in response to one state official's requests that EPA expand the registration of Poast Plus to include minor crops, merely explained that regulatory action was not needed because Poast Plus already had a federal registration for minor crops. Another EPA official stated publicly that BASF's conduct was "perfectly legal" under FIFRA. See *Farmers Win Fight With Pesticide Company*, THE BISMARCK TRIBUNE (May 18, 1997), at 8A.

Respondents also argue that EPA has disclaimed any involvement in pesticide pricing, which they contend is at the heart of their case. See Resp. 2nd Supp. Br. 5 n.4. In fact, EPA has affirmatively stated that it has no interest in using FIFRA to control pesticide pricing. See, *e.g.*, DX 636 ("we do not believe that Congress, under FIFRA, intended the Agency to evaluate or challenge pricing approaches employed by the pesticide manufacturers"). If claims such as respondents' are recognized, however, then FIFRA will impose pricing restrictions through the back door because, under respondents' theory, it is unlawful exploitation of the federal regulatory scheme to sell pesticides sharing the same active ingredient at different prices.

expressing the views of the United States regarding the issue of FIFRA preemption presented by this case.

III. THE FIRST AMENDMENT ISSUE PRESENTED ALSO MERITS REVIEW

This case also presents an important First Amendment issue. The jury was invited to hold BASF liable, in part, on the basis of truthful statements to regulatory authorities regarding the possible illegal off-label use of its products and truthful statements in a magazine article about the laws that govern pesticide use. Because the Minnesota Supreme Court's decision threatens severely to inhibit corporate speech on issues of substantial public concern – and because, in the event the Court remands the case for reconsideration of the FIFRA issue, the lower courts will otherwise repeat their errors under the First Amendment – a grant of certiorari on that issue is warranted.

CONCLUSION

The petition for certiorari should be granted. In the alternative, the petition should be granted and the case summarily vacated and remanded for consideration in light of *Bates*.

Respectfully submitted.

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